Sinohydro Corp (M) Sdn Bhd v KAJ Development Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA24C-250–12 OF 2020 AND APPLICATION FOR EXECUTION NO WA36-31–11 OF 2022
ALIZA SULAIMAN J
24 MARCH 2023

Civil Procedure — Stay of execution — Special circumstances — Whether defendant had shown special circumstances to stay court order allowing enforcement of adjudication decision favouring plaintiff — Whether refusing stay could result in plaintiff selling off defendant's lands against which plaintiff had obtained writ of seizure and sale (WSS) and prohibitory order (PO) — Whether such action would cause irreparable damage to defendant and jeopardise implementation of national development project which was being developed by defendant on those very lands — Whether court had to consider importance of the project to the public in deciding to grant the stay — Whether plaintiff's ex parte manner of obtaining the WSS and PO had to be set aside as defendant was never heard and plaintiff had failed to make full and frank disclosure of material facts when obtaining the same

The defendant ('KAJ') was the master developer of the multi-billion Ringgit Melaka Gateway Project (the project') which involved reclamation of land from the sea in the Straits of Malacca. KAJ appointed the plaintiff ('Sinohydro') as its contractor to carry out a part of the project. The parties agreed that to secure sums payable by KAJ to Sinohydro under their contract, KAJ would create fixed charges over nine parcels of KAJ's lands ('the nine plots') in favour of Sinohydro. The title deeds to the nine plots were handed over to Sinohydro for custody but for some reason the charges could not be registered. Sinohydro subsequently suspended its works when it did not receive payment of RM163.3m from KAJ in respect of work done. In response, KAJ terminated Sinohydro's appointment as contractor. Sinohydro obtained a court order declaring that it was the equitable chargee over the nine plots and also took steps under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to claim payment of the amounts owing to it by KAJ. At the end of the CIPAA proceedings, the adjudicator certified that KAJ should pay Sinohydro RM205,805,673.05 ('the adjudicated sum') in one lump sum. Sinohydro applied to the High Court for an order to enforce the said sum. The court allowed enforcement of RM202,180, 729.25 out of the adjudicated sum. KAJ applied to stay the execution of the enforcement order pending the disposal of its appeals against the making of the adjudication decision ('AD') as well as the making of the enforcement order ('the CIPAA appeals'). Since it did not receive any payment under the AD, Sinohydro applied to court ex parte

(which was granted) for writs of seizure and sale ('WSS') and prohibitory orders ('PO') against another 13 pieces of land owned by KAJ ('the 13 plots') which was different from the nine plots but were an integral part of the project. KAJ applied to set aside the said ex parte order, inter alia, on the ground that Sinohydro had failed to make full and frank disclosure of material facts to the court when obtaining the order, including the fact that Sinohydro was already a security creditor of the nine plots, that the CIPAA appeals would be rendered nugatory if KAJ succeeded in the appeals and then found that Sinohydro had already sold the 13 plots and that the project would be irreversibly jeopardised if Sinohydro were to sell the 13 plots. The deputy registrar of the court dismissed KAJ's application to set aside the ex parte order. KAJ appealed against the decision to the judge-in-chambers.

Held, allowing stay of execution of the order to enforce the AD and setting aside the ex parte order for issuance of the WSS and PO:

(1) It was in the public interest to stay the execution of the enforcement order pending the disposal of the CIPAA appeals to preserve the integrity of the appeals. If the stay was refused and Sinohydro proceeded to sell the 13 lots, the project, which was national project, would be jeopardised. KAJ had also proven, on balance of probabilities, that it would suffer irreversible and irreparable damage which could not be compensated with costs if the stay was not granted and Sinohydro proceeded to sell the 13 lots (see paras 39 & 56).

(2) The project that was being developed, among others, on the 13 lots, was part of a national economic transformation plan which would be jeopardised if Sinohydro was allowed to proceed to sell those lands. Such action would adversely impact the huge investments, including from foreign parties, in the project. The project was expected to attract billions in foreign direct investment, create thousands of jobs and contribute billions to the Gross Domestic Product. Hence, the importance of the project was a material consideration for the court in deciding to grant the stay application (see paras 40–41, 43–45 & 54).

(3) KAJ never had the opportunity to be heard before the ex parte order was made; hence it had a basic right to have the order set aside. In any event, Sinohydro had not made full and fair disclosure of all material facts when it applied for the ex parte order. Those facts would have enabled the deputy registrar to have made a fair and just assessment of Sinohydro's application for the issuance of the WSS and the PO. Consequently, the immediate discharge of the ex parte order was justified (see paras 60 & 71).

[Bahasa Malaysia summary

Defendan ('KAJ') merupakan pemaju induk Melaka Gateway Project ('projek tersebut') berbilion Ringgit yang melibatkan penambakan tanah dari laut di Selat Melaka. KAJ melantik plaintif ('Sinohydro') sebagai kontraktornya untuk melaksanakan sebahagian daripada projek tersebut. Pihak-pihak bersetuju bahawa untuk mendapatkan jumlah yang perlu dibayar oleh KAJ kepada Sinohydro di bawah kontrak mereka, KAJ akan membuat gadaian tetap ke atas sembilan keping tanah KAJ ('sembilan petak tersebut') ke atas Sinohydro. Suratan hak milik kepada sembilan petak telah diserahkan kepada Sinohydro untuk jagaan tetapi atas sebab tertentu gadaian tidak dapat didaftarkan. Sinohydro kemudiannya menggantung kerja-kerjanya apabila ia tidak menerima bayaran sebanyak RM163.3m daripada KAJ berkenaan dengan kerja yang dilakukan. Sebagai balasan, KAJ telah menamatkan pelantikan Sinohydro sebagai kontraktor. Sinohydro memperoleh perintah mahkamah yang mengisytiharkan bahawa ia adalah pemegang gadaian saksama ke atas sembilan petak dan turut mengambil langkah di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk menuntut pembayaran amaun yang terhutang oleh KAJ. Pada akhir prosiding APAIP, adjudikator memperakui bahawa KAJ harus membayar Sinohydro RM205,805,673.05 ('jumlah yang diadili') dalam satu jumlah sekali gus. Sinohydro memohon kepada Mahkamah Tinggi untuk mendapatkan perintah untuk menguatkuasakan jumlah tersebut. Mahkamah membenarkan penguatkuasaan RM202,180,729.25 daripada jumlah yang diadili. KAJ memohon untuk menggantung pelaksanaan perintah penguatkuasaan sementara menunggu pelupusan rayuannya terhadap pemberian keputusan adjudikasi ('AD') serta pemberian perintah penguatkuasaan ('rayuan APAIP'). Memandangkan ia tidak menerima apa-apa bayaran di bawah AD, Sinohydro memohon kepada mahkamah ex parte (yang telah diberikan) untuk writ penyitaan dan penjualan ('WSS') dan perintah larangan ('PO') terhadap 13 lagi keping tanah yang dimiliki oleh KAJ ('13 petak tersebut') yang berbeza daripada sembilan petak tetapi merupakan sebahagian daripada projek. KAJ memohon untuk mengetepikan perintah ex parte tersebut, antara lain, atas alasan bahawa Sinohydro telah gagal untuk membuat pendedahan penuh dan terus terang fakta material kepada mahkamah apabila mendapatkan perintah tersebut, termasuk fakta bahawa Sinohydro telah pun menjadi pemiutang bercagar sembilan petak tersebut, bahawa rayuan APAIP akan menjadi nugatori jika KAJ berjaya dalam rayuan dan kemudian mendapati bahawa Sinohydro telah menjual 13 petak tersebut dan bahawa projek akan diprejudiskan hingga tidak dapat dipulihkan jika Sinohydro menjual 13 petak tersebut. Timbalan Pendaftar Mahkamah menolak permohonan KAJ untuk mengetepikan perintah ex parte. KAJ merayu terhadap keputusan tersebut kepada hakim dalam kamar.

Diputuskan, membenarkan penggantungan pelaksanaan perintah untuk

menguatkuasakan AD dan mengetepikan perintah ex parte untuk pengeluaran WSS dan PO:

(1) Ia adalah demi kepentingan awam untuk menangguhkan pelaksanaan perintah penguatkuasaan sementara menunggu pelupusan rayuan APAIP untuk memelihara integriti rayuan. Jika penangguhan tersebut ditolak dan Sinohydro meneruskan untuk menjual 13 petak tersebut, projek, yang merupakan projek negara, akan terjejas. KAJ juga telah membuktikan, berdasarkan imbangan kebarangkalian, bahawa ia akan mengalami kerugian yang tidak dapat dipulihkan dan tidak boleh dibaiki yang tidak boleh dibayar pampasan dengan kos jika penggantungan tidak diberikan dan Sinohydro meneruskan untuk menjual 13 petak tersebut (lihat perenggan 39 & 56).

(2) Projek yang sedang dibangunkan, antara lain, di 13 petak tersebut, adalah sebahagian daripada pelan transformasi ekonomi negara yang akan terjejas sekiranya Sinohydro dibenarkan meneruskan penjualan tanah tersebut. Tindakan sedemikian akan memberi kesan buruk kepada pelaburan besar, termasuk daripada pihak asing, dalam projek. Projek tersebut dijangka menarik berbilion pelaburan langsung asing, mewujudkan beribu-ribu pekerjaan dan menyumbang berbilion-bilion kepada Keluaran Dalam Negara Kasar. Oleh itu, kepentingan projek merupakan pertimbangan material bagi mahkamah dalam membuat keputusan untuk memberikan permohonan penggantungan (lihat perenggan 40–41, 43–45 & 54).

(3) KAJ tidak pernah berpeluang didengari sebelum perintah ex parte dibuat; maka ia mempunyai hak asas untuk mengetepikan perintah tersebut. Walau apa pun, Sinohydro tidak membuat pendedahan penuh dan saksama tentang semua fakta material apabila ia memohon perintah ex parte. Fakta tersebut akan membolehkan timbalan pendaftar membuat penilaian yang adil dan saksama terhadap permohonan Sinohydro untuk pengeluaran WSS dan PO. Akibatnya, pelepasan segera perintah ex parte adalah wajar (lihat perenggan 60 & 71).]

Cases referred to

Airmartech Corporation (M) Sdn Bhd v Equaltra (M) Sdn Bhd [2002] 6 MLJ 657, HC (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382; [1986] CLJ Rep 45; [1986] 1 CLJ 2, SC (refd)

Brink's-Mat Ltd v Elcombe and Others [1988] 3 All ER 188, CA (refd)

Chang Shu Hua (P) v Goon Fook Hong [2008] MLJU 181; [2008] 3 CLJ 429, CA (refd)

Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd [2021] MLJU 1340, HC (refd)

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213, CA (refd)
KAJ Development Sdn Bhd v Sinohydro Corporation (M) Sdn Bhd and another case [2022] MLJU 1413; [2022] 1 LNS 1454, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316; [2004] 1 CLJ 239, CA (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Leong Chee Kong & Anor v Tan Leng Kee [2000] MLJU 753; [2001] 5 CLJ 408, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2) [2007] 6 MLJ 260, HC (refd)
The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals [2022] 1 MLJ 316, CA (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5 15(b), (d), 16(1)(a), 28, 28(2)
Companies Act 2016 s 494
Courts of Judicature Act 1964 s 73
National Land Code Form 16A
Rules of Court 2012 O 32 r 6, O 42 r 13, O 45 r 12, O 47 r 6, 6(c), O 56 r 1, O 92 r 4
Rules of the Court of Appeal 1994 r 13

Chan Sock Mun (with Tan Chee Ying) (Tan Chuan Yong & SM Chan) in Originating Summons No WA-24C-250–12 of 2020 and Application for Execution No WA-36–31–11 of 2022 for the plaintiff.
Andrew Fernandez (with Verene Tan Yeen Yi and Carine Cheong) (Chooi & Company + Cheang & Ariff) in Originating Summons No WA-24C-250–12 of 2020 for the defendant.
Loh Siew Cheang (with Carine Cheong) (Chooi & Company + Cheang & Ariff) in Application for Execution No WA-36–31–11 of 2022 for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] These grounds of judgment pertain to an application and an appeal that was heard by this court recently, namely:

(a) the application by KAJ Development Sdn Bhd ('KAJ') in encl 32 of Originating Summons No WA24C-250–12 of 2020 ('OS No 250')

pursuant to s 73 of the Courts of Judicature Act 1964 (Act 91) ('the CJA 1964') and/ or O 92 r 4 of the Rules of Court 2012 ('the RC 2012') for, among others, the execution of the order of this court dated 16 April 2021 allowing Sinohydro Corp (M) Sdn Bhd ('Sinohydro') to enforce the adjudication decision dated 21 October 2020 (amended on 4 November 2020) ('AD') by the learned Adjudicator, Mr James Patrick Monteiro pursuant to sub-s 28(1) of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA') ('enforcement order') be stayed pending the disposal of KAJ's appeal to the Court of Appeal ('the stay application'); and

(b) KAJ's notice of appeal to the judge in chambers (encl 34) against the decision by the learned deputy registrar ('DR') on 20 January 2023 in Application for Execution No WA-36-31–11 of 2022 ('AE No 31') in dismissing KAJ's application pursuant to O 32 r 6 and O 42 r 13 of the RC 2012 and/ or the inherent jurisdiction of the court for, among others, that the order granted ex parte by the court on 11 November 2022 ('ex parte order') allowing a writ of seizure and sale ('WSS') to be issued and a prohibitory order ('PO') against KAJ to be set aside ('the appeal against DR's decision').

[2] Having considered the related cause papers and written submissions filed, and having heard oral submissions by the learned counsels appearing for the parties, the court had:

(a) on 3 January 2023, allowed the stay application with costs in the cause; and

(b) on 10 March 2023, allowed the appeal against DR's decision with cost of RM10,000, subject to allocatur.

THE CAUSE PAPERS

[3] The cause papers are as follows:

(a) the stay application:

(i) notice of application dated 7 December 2022 (encl 32);

(ii) KAJ's affidavit in support ('AIS') affirmed by its Director, Siow Yoke Foong on 7 December 2022 (encls 33–34);

(iii) Sinohydro's affidavit in reply ('AIR') affirmed by its Deputy Project Manager, Liu Haiyou on 20 December 2022 (encl 37);

(iv) KAJ's AIR affirmed by the same deponent on 23 December 2022 (encl 38);

(v) KAJ's additional affidavit affirmed by the same deponent on

29 December 2022 (encl 39); and

(vi) Sinohydro's additional affidavit affirmed by the same deponent on 30 December 2022 (encl 40).

(b) the appeal against DR's decision:

(c) ex parte notice of application dated 7 November 2022 (encl 1);

(d) Sinohydro's AIS affirmed by its Managing Director, Zhou Jiayi on 4 November 2022 (encl 2);

(e) certificate of urgency dated 7 November 2022 (encl 3);

(f) notice of application to set aside the ex parte order dated 6 December 2022 (encl 12);

(g) KAJ's affidavit in support ('AIS') affirmed by Datuk Siow Yoke Foong on 5 December 2022 (encls 13–14);

(h) Sinohydro's AIR affirmed by Liu Haiyou on 30 December 2022 (encl 15);

(i) KAJ's AIR affirmed by the same deponent on 9 January 2023 (encl 16); and

(j) notice of appeal to judge in chambers dated 25 January 2023 (encl 34).

SALIENT FACTS

[4] Part of the background facts can be discerned from the judgment of this court in *KAJ Development Sdn Bhd v Sinohydro Corporation (M) Sdn Bhd and another case* [2022] MLJU 1413; [2022] 1 LNS 1454.

[5] To recapitulate, Sinohydro is a private limited company, incorporated in Malaysia and having a business address at 26–1, Menara 1MK, Kompleks 1 Mont' Kiara, No 1, Jalan Kiara, Mont' Kiara, 50480 Kuala Lumpur.

[6] KAJ is a private limited company incorporated in Malaysia having its business address at No 1, Jalan Baiduri 2, Taman Pulau Melaka, 75000 Melaka.

[7] KAJ is the developer of the Melaka Gateway Project ('project') involving reclamation of land from the sea in the Straits of Malacca of approximately 1,359 acres comprising of three artificial islands, namely Pulau Melaka East 1 ('PME 1'), Pulau Melaka East 2 ('PME 2') and Pulau Melaka 4 and one natural island, Pulau Melaka East 3 ('PME 3').

[8] Between 2009 to 2017, KAJ and the Melaka State Government ('State

Government') entered into several agreements whereby the State Government had granted KAJ the right to carry out and complete land reclamation works on PME 1, PME 2 and PME 3. One of the agreements is the reclamation agreement dated 4 October 2017 ('reclamation agreement'). Pursuant to cll 8.2 and 11.1 of the reclamation agreement, KAJ was to complete reclamation works on PME 1, PME 2 and PME 3 within 36 months from the date of the reclamation agreement.

[9] By way of a Letter of Award dated 6 June 2017 ('LoA'), KAJ had awarded the 'Design And Build Contract For The Reclamation And Related Works For (Part of) 609 Acres of Land At The Melaka Gateway Project, Melaka, Malaysia' to the Consortium of Sinohydro Corp Ltd — Sinohydro Corp (M) Sdn Bhd ('Consortium') as contractor for the project.

[10] In addition to the LoA, KAJ and the Consortium had also entered into several other agreements, including the contract agreement dated 16 August 2017 and the security agreement dated 4 September 2017 where KAJ was obligated to create a first party fixed charge over three parcels of land in PME1 pursuant to the National Land Code (Act 56) ('the NLC').

[11] However, as a result of a surrender and re-alienation exercise on the parcels of land constituting PME 1, Sinohydro released the original land titles to the three parcels of PME1 land to KAJ.

[12] A Novation Agreement dated 22 September 2017 was entered where all benefits, rights, titles, entitlements, interest, obligations and liabilities of the Consortium under the agreements will be novated, transferred and assigned to Sinohydro subject to the terms and conditions contained therein.

[13] Subsequently, KAJ and Sinohydro entered into the following agreements:

(a) amendment letter dated 8 February 2018 in respect of the LoA;

(b) amendment agreement 1 dated 8 February 2018 in respect of the conditions of contract to the contract agreement;

(c) deed of termination (security agreement) dated 8 February 2018; and

(d) a new security agreement dated 8 February 2018 ('security agreement').

[14] Pursuant to the security agreement, it was agreed, among others, that as security for the secured amount for Stage 1 in the sum of RM724,586.444, KAJ shall execute charge annexure(s), charge form(s) and such other documents for the purpose of creating a first party fixed charge pursuant to the provisions of the NLC and Companies Act 2016 (Act 777) ('the CA 2016')

over the following nine plots of land within eight months from 8 February 2018:

(a) HS(D) 83361, PT 886, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 13,881 sqmt;

(b) HS(D) 83362, PT 887, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 16,997 sqmt;

(c) HS(D) 83363, PT 888, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 18,049 sqmt;

(d) HS(D) 83365, PT 890, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 27,397 sqmt;

(e) HS(D) 83366, PT 909, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 18,575 sqmt;

(f) HS(D) 83373, PT 897, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 17,401 sqmt;

(g) HS(D) 83375, PT 899, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 14,164 sqmt;

(h) HS(D) 83376, PT 900, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 24,038 sqmt; and

(i) HS(D) 83377, PT 901, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 19,627 sqmt

('nine plots of land').

[15] KAJ had executed the requisite Charge Form (Form 16A) and Charge Annexure ('charge documents'). The issue document of titles of the nine plots of land were deposited with Sinohydro and, as at the date of the stay application and the appeal against DR's decision, remained with Sinohydro.

[16] The State Authority had, vide a letter dated 6 April 2018, rejected KAJ's application to charge the nine plots of land. Sinohydro's attempt to create a first legal charge on the nine plots of land by presenting the relevant documents to the Melaka Land Registry was similarly refused for the reason that a charge cannot be registered in favour of a non-financial institution.

[17] By October 2018, KAJ failed to create and perfect the charge over the nine plots of land. In addition, Sinohydro claimed that KAJ did not make any payments despite the issuance of 18 interim payment certificates certifying that a sum of RM163,252,560.86 was due and payable to Sinohydro for works

done at PME1. Sinohydro then decided to suspend the works.

[18] Sinohydro's appointment as contractor was terminated by KAJ on 15 March 2019. The State Government terminated the reclamation agreement on 16 November 2020.

[19] On 4 December 2020, Sinohydro obtained an order by the High Court declaring that it has an equitable charge over the nine plots of land. This decision was affirmed by the Court of Appeal. KAJ's motion for leave to appeal to the Federal Court was dismissed.

[20] Earlier, on 18 June 2019, Sinohydro served a Payment Claim on KAJ pursuant to s 5 of the CIPAA for the total sum of RM230,911,904.03. At the end of the adjudication proceedings, the learned Adjudicator determined, inter alia, that KAJ shall pay to Sinohydro the sum of RM205,805,673.05; the adjudicated sum shall be paid on or before 11 November 2020 in one lump sum; and KAJ's claims as per its payment response and adjudication response are rejected and dismissed.

[21] As no payment was forthcoming from KAJ, Sinohydro filed OS No 250. On 16 April 2021, this court allowed part of the AD to be enforced under sub-s 28(2) CIPAA ie in the sum of RM202,180,729.25. KAJ's appeal against this decision of the court as well as the decision in respect of KAJ's applications pursuant to s 15(b) and (d) and s 16(1)(a) of the CIPAA is now scheduled for hearing on 31 July 2023 ('CIPAA appeals').

[22] In 2019 and 2020, KAJ and Sinohydro commenced arbitration proceedings against each other. These proceedings are consolidated in SIAC Arbitration No 250 of 2019 and SIAC Arbitration No 156 of 2020 and are set for hearing in October 2023.

[23] Meanwhile, on 28 July 2020, KAJ was wound up by one of its creditors, Mei He Development Sdn Bhd ('WU order'). Sinohydro supported the winding up petition.

[24] However, on 1 October 2020, the WU order was stayed by the Shah Alam High Court ('SAHC') pending KAJ's appeal to the Court of Appeal against the granting of the WU order. Sinohydro had appealed against the order for stay and it was dismissed by the Court of Appeal.

[25] The WU order was terminated by the SAHC on 24 January 2022.

[26] On 24 February 2022, Sinohydro petitioned to wind up KAJ as KAJ

had not paid the adjudicated sum. KAJ applied to strike out this petition. On 27 June 2022, the Kuala Lumpur High Court allowed the application. Sinohydro did not appeal against this decision.

[27] Later, on 7 November 2022, Sinohydro applied for a WSS and a PO on an ex parte basis on the following plots of land which are different from the nine plots of land:

(a) HS(D) 83359, PT 884, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 12,383 sqmt;

(b) HS(D) 83360, PT 885, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 13,962 sqmt;

(c) HS(D) 83368, PT 892, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 28,206 sqmt;

(d) HS(D) 83369, PT 893, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 24,038 sqmt;

(e) HS(D) 83371, PT 895, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 16,349 sqmt;

(f) HS(D) 83372, PT 896, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 13,881 sqmt;

(g) HS(D) 83374, PT 898, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 13,840 sqmt;

(h) HS(D) 83378, PT 902, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 19,749 sqmt;

(i) HS(D) 83379, PT 903, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 12,424 sqmt;

(j) HS(D) 83380, PT 904, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 29,542 sqmt;

(k) HS(D) 83381, PT 905, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 22,703 sqmt;

(l) HS(D) 83382, PT 906, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 15,418 sqmt; and

(m) HS(D) 83384, PT 907, Kawasan Bandar XLIII, District of Melaka Tengah, State of Melaka in area measuring approximately 1,295 sqmt

('subject lands').

[28] According to KAJ, the subject lands cover approximately 2,406,723

sqft on PME 1 and each part of the subject lands are an integral part of the project.

[29] Sinohydro obtained the ex parte order on 11 November 2022 pursuant to O 45 r 12 and O 47 r 6 of the RC 2012 and the same was presented for registration at the Land Office on 23 November 2022.

[30] For reasons best known to Sinohydro, it served the ex parte order on KAJ only on 30 November 2022. Six days later, KAJ filed its notice of application to set aside the ex parte order, followed by the stay application with a certificate of urgency one day after that.

[31] On 8 December 2022, this court granted an ad interim stay of execution of the enforcement order until 3 January 2023, the date for hearing of the stay application.

(A) THE STAY APPLICATION

The parties' submissions

[32] For KAJ, Mr Andrew Fernandez zealously argued that there are special circumstances warranting the grant of the prayers in the stay application on the following grounds:

(a) there is a real risk that the subject lands will be disposed before the determination of the CIPAA appeals. If the subject lands are disposed and KAJ is eventually successful in the CIPAA appeals, the CIPAA appeals would be rendered nugatory as the project, which is a national project, would be jeopardised;

(b) Sinohydro is executing the enforcement order through a WSS over KAJ's properties in circumstances where Sinohydro has an equitable charge over the nine plots of land. Instead of taking steps to enforce its securities, and having unsuccessfully petitioned to wind up KAJ, Sinohydro's real intention is to preserve its securities to recover the sums awarded by the Arbitral Tribunal in the event the award is in its favor. The ex parte order was granted in excess of jurisdiction and is an abuse of the court's process;

(c) in obtaining the ex parte order, Sinohydro had failed to make full and frank disclosure of material facts;

(d) even if the court finds that there are no special circumstances, the court is empowered and has the discretion to grant a stay as KAJ would have suffered irreversible and irreparable damage which cannot be compensated with costs in the event the subject lands are disposed and

KAJ is successful in the CIPAA appeals as the development of the project will be seriously affected if the stay application is dismissed. The balance of convenience tilts in favour of KAJ in granting the stay;

(e) there is no delay in KAJ's application for a stay; and

(f) Sinohydro will not suffer any prejudice if a stay of the enforcement order is granted as it is a secured creditor and may pursue its remedies under the securities. The judgment sum includes interest at the rate of 6.88%pa calculated from 1 June 2019 until full realisation and costs. As at the date of the written submission and hearing of the stay application, the CIPAA appeals will be heard on 4 April 2023.

[33] With no less zeal, Ms SM Chan put forth Sinohydro's counter arguments that:

(a) by applying the legal principles as elucidated by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, most of KAJ's grounds to support the stay application do not amount to special circumstances warranting a stay of the enforcement order as the reasons do not relate to the enforcement of the order. The learned counsel had also cited the decision of this court in *Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd* [2021] MLJU 1340, which was affirmed by the Court of Appeal on 23 February 2022;

(b) there are no general principles of law that a secured creditor must first realise its security before taking execution proceedings on assets without security in recovery of a judgment debt. The learned counsel submitted at length in countering KAJ's contentions regarding the value of the nine plots of land which is said to have a forced sale value of RM978,191,699.27 while according to the Official Receiver's Report dated 9 September 2020 issued pursuant to s 494 of the CA 2016, the value is RM695,889,401. Sinohydro retorted that:

(i) it has obtained a valuation of the lands in PME1, where the nine plots of land and the subject lands are situated, by a registered valuer who valued the lands at RM1,076 per square meter or RM100 per sqft. Five of the nine plots of land are subject of a Registrar's Caveat and the value of the remaining four plots is only around RM70m (this figure was mentioned by Ms SM Chan during oral submission when questioned by the court) whereas Sinohydro has claimed RM248,268,544.59 against KAJ in the arbitration proceedings;

(ii) the secured amount for Stage 1 is RM724,586,444 and as KAJ had, in the security agreement, undertaken to provide a forced sale value of not less than 135% of the secured amount, the value of the charged land or security shall be 135% x RM724,586,444 =

RM978,191,699.40. Therefore, the sum of RM192,191,789.57 and RM785,999,909.70 as stated in Appendix 1 to the amendment letter 1 is not the agreed value for the nine plots of land but the total security that must be provided by KAJ for the secured amount of RM724,586,444 for Stage 1; and

(iii) the value of assets as mentioned in the Official Receiver's Report is not the official receiver's valuation of the properties but merely reflecting the declaration by Siow Yoke Foong of the value of KAJ's assets;

(c) the stay application is not bona fide as Sinohydro has not been paid at all for the works done, a fact which is not disputed by KAJ. Furthermore, Sinohydro is out-of-pocket in the sum of RM45,591,072.14 being the Performance Security paid by Sinohydro to KAJ but was not refunded by KAJ to Sinohydro upon termination of the contract by KAJ;

(d) based on the contractual provisions, KAJ does not dispute that it had failed to create and perfect the relevant land charges that it was obligated do and that Sinohydro has the right to suspend work in the event of non-payment and/ or failure by KAJ to create and perfect the land charges;

(e) in the winding up proceedings, KAJ has taken the position that it has ample realisable assets to pay its debt. Hence, KAJ should not be allowed, in the present application, to take the position that its assets should not be realised to satisfy the enforcement order;

(f) from the plethora of litigation taken by KAJ, it can be seen that KAJ uses, and then denies or refutes the issue of security, which Sinohydro ought to have, as and when it suited KAJ. KAJ should not have multiple bites at the cherry by relying on the same grounds on security held by Sinohydro and the arbitration between the parties as had been advanced by KAJ in previous proceedings;

(g) whether the project is a national project or otherwise is not a material consideration as it does not relate to the enforcement of the judgment. Further, KAJ has not adduced any evidence to show that there are any on-going activities or development on the nine plots of land and the subject lands. KAJ's argument that Sinohydro should call upon its securities first demonstrates that it is misleading for KAJ to submit that it would suffer irreversible or irreparable damage since the nine plots of land are located at the same vicinity as the subject lands ie on PME1. Thus, the sale of the nine plots of land should have the same effect on KAJ as the sale of the subject lands;

(h) there is no averment in any of KAJ's affidavits that Sinohydro will not be able to repay sum in the enforcement order to KAJ in the event KAJ succeeds in the CIPAA appeals; and

(i) there is inordinate delay on KAJ's part in filing the stay application. Almost 20 months have passed since the enforcement order was made. Moreover, KAJ is aware that Sinohydro has every intention of enforcing the said Order as evidenced by the filing of the winding up petition by Sinohydro against KAJ.

The decision of the court

[34] Section 73 of the CJA 1964 provides that:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[35] Further, r 13 of the Rules of the Court of Appeal 1994 (PU (A) 524/1994) stipulates that:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

[36] It is trite that an applicant must demonstrate special circumstances warranting a stay of execution of the order under appeal. There are myriad circumstances that could constitute special circumstances with each case depending on its own facts. In this regard, the courts have an absolute and unfettered discretion as to the granting or refusing a stay provided that the exercise of such discretion is founded upon established judicial principles (see the case authority which was relied upon by both KAJ and Sinohydro namely, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 and the other cases as submitted by KAJ ie *Airmartech Corporation (M) Sdn Bhd v Equaltra (M) Sdn Bhd* [2002] 6 MLJ 657, *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213 and *Chang Shu Hua (P) v Goon Fook Hong* [2008] MLJU 181; [2008] 3 CLJ 429).

[37] In *Chang Shu Hua*'s case, Abdul Malik Ishak JCA in delivering the judgment of the Court of Appeal (at pp 444–445), referred to His Lordship's decision in *Leong Chee Kong & Anor v Tan Leng Kee* [2000] MLJU 753; [2001] 5 CLJ 408 wherein His Lordship had considered the factors as to whether the applicant will suffer irreparable damage and would be irremediably injured if stay was refused. His Lordship went on to say:

[34] Other factors must be taken into account in applying the special circumstances approach. These factors, and they are not exhaustive, may be listed as follows:

(a) whether damages would be an adequate remedy if the applicant who applies for the stay succeeds in his appeal?

(b) the public policy consideration that has to be taken into account;

(c) the need to examine the subject matter of the appeal;

(d) the need to weigh in a balance of the hardship of the parties involved;

(e) the delay in filing the application for a stay;

(f) whether the court would exercise its inherent jurisdiction to grant the stay; and

(g) where would the balance of convenience or the balance of justice lie?

...

[40] In deciding where the balance of convenience or the balance of justice lie, the court has to decide between two competing interests. One interest would be asking for a stay while the other interest is opposing the stay. It is the duty of the court to look at the evidence and decide whether the balance of convenience or the balance of justice is in favour of the applicant or the respondent. If it is in favour of the applicant then the stay would be granted and if it is in favour of the respondent no stay would be granted. Here, the balance of convenience or the balance of justice tilted in favour of the plaintiff appellant. The stay should be refused.

[38] Earlier in the judgment, His Lordship reminded that:

[24] There are no definitive parameters within which the court may exercise its discretion. In the final analysis, what would constitute 'special circumstances' is purely a question of degree. Each case has to be decided on its own facts. The list of factors constituting 'special circumstances' cannot be circumscribed. It will continue to grow as time goes by (*Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514; [1993] 4 CLJ 98).

[39] The above quoted passage certainly rings true in the instant case as, having considered the affidavit evidence and the submissions of the parties, this court was persuaded to allow the stay application primarily on the ground that it is in the public interest to stay the execution of the enforcement order pending the disposal of the CIPAA appeals to preserve the integrity of the appeal. If the stay application is refused and Sinohydro proceeds to sell the subject lands, the project, which is a national project (see para 4 of the AIS, encl 33 and exh 'A2'), would surely be jeopardised.

[40] It is irrefutable that the subject lands are situated in PME 1 and PME 1 is earmarked for *Tourism & Lifestyle*, which will consist of the Melaka International Cruise Terminal ('MICT') and Ferry; Tourism; MICE & Hotels; Residential & Commercial; Health & Education; Vocational & Training;

A Cr8tive BizHub; Innovation Business Park and Maritime Business Park (see the Melaka Gateway Master Plan in exh 'A35', encl 38).

[41] It is also irrefutable that the project is a national project and is part of the economic transformation plan of the nation (see the letters from the Prime B Minister's Private Secretary dated 6 March 2014 to the Minister in the Prime Minister's Department and from the Malacca Deputy State Secretary (Development) dated 10 December 2019 to the Secretary-General of the Ministry of Home Affairs in exh 'A2', encl 33). Sinohydro claims that whether the project is a national project or otherwise is not a material consideration in C the stay application. However, this court holds a contrary opinion.

[42] In para 18 of the AIS, KAJ affirmed that, following the termination of the WU order and negotiations between KAJ and the State Government, the project was reinstated. In support of this averment, KAJ exhibited the news D articles by *The Star*, *Melaka Hari Ini* and *Bernama* all dated 8 March 2022 as exh 'A18'.

[43] According to the article in *The Star*, the State Government 'have no E problem with KAJ Development continuing the development' and KAJ has pledged to complete the RM1.5 billion MICT within 15 months. In addition, a RM1.5 billion theme park would also be completed by 2026. The project is expected to draw a net investment totalling RM46 billion including, through foreign direct investments.

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[44] *Melaka Hari Ini* reported that the project is expected to contribute more than RM125 billion to gross domestic product ('GDP') with a projected double impact of RM1.2 trillion while PME 1 alone will contribute more than RM32.5 billion to Melaka's GDP with a projected double impact of G RM306.73 billion.

[45] Based on the article by *Bernama*, the State Senior EXCO for Investment, Industry and Entrepreneur Development had said that the project on PME1 was expected to be completed within six years with a total H investment estimated at RM15.25 billion. The construction of a world-class modern theme park is expected to attract around 5 million visitors every year. The project will offer more than 45,000 jobs, of which 11,470 was being created in the development of PME 1.

I **[46]** In para 5 of KAJ's additional affidavit (encl 39), it was averred that:

> Sebagai lanjutan kepada perenggan 4 AS Defendan, saya menyatakan bahawa di Expo di Dubai pada tahun 2021, Memorandum Persefahaman dan Memorandum Perjanjian telah dilaksanakan antara KAJ dan pelbagai pelabur-pelabur. Pelbagai pelabur-pelabur termasuk Dubai Integrated Zones Authority, Microsoft Corp

Malaysia dan Canada University Dubai. Selain itu, Malaysian Association of Tour & Travel Agents (MATTA) Melaka Chapter telah menandatangani memorandum persefahaman dengan Middle East Consortium Group, Global Travel Services untuk meningkatkan perjalanan dan pelancongan antara kedua-dua wilayah.

[47] An article titled 'Melaka Sealed 7 MOUs at Dubai Expo' dated 15 March 2022 (exh 'A36') reported that the State Government has secured seven memoranda of understanding ('MoU') at Expo 2020 Dubai, which was held in March 2022, worth at least RM5 billion. The first MoU signed was between MG Velocity Sdn Bhd, KAJ's nominee, with X Infinity Property Sdn Bhd and Total Group Bhd for the development of the MICT.

[48] The second MoU was between KAJ and Assetwall Sdn Bhd for the development of the theme park on PME1 while the third MoU was signed by KAJ and Dubai Integrated Zones Authority, a Government of Dubai Authority and operating through its business division Dubai Airport Free Zone.

[49] The significance of the project was alluded to by Azmi Ariffin J when His Lordship allowed KAJ's application to stay the WU order pending KAJ's appeal to the Court of Appeal in the following excerpt from the grounds of judgment (exh 'A16'):

> [48] Taking the fact and evidence as a whole, I think if stay is not granted, the Reclamation Works carried out would be adversely affected. This is where the court must take into consideration the element of public interest because the respondent is the master developer for the Melaka Gateway project covering a gross land area of 1,359 acres across four islands.
>
> [49] Such grave impact will definitely affect the continuation of business of the respondent which may result in difficulty by the respondent in running their business and operations smoothly if the official receiver take into custody or control all the assets, property of the company and supervision all the movements of the company funds.
>
> [50] In short, the entire organization of the respondent would be jeopardize. I am mindful of the fact that the Melaka Gateway Project, an offshore development is part of the Economic Transformation Project by the Malaysian Government. Respondent owed a heavy responsibility both legally and morally to the Malaysian Government, State Government and the public to ensure that the national projects were not be disrupted or badly affected.

[50] Sinohydro's appeal against the decision by Azmi Ariffin J was dismissed by the Court of Appeal. I am mindful that the issue before His Lordship was whether to grant or refuse an order for stay of the winding up proceedings whereas the question before this court is in the context of a stay of the enforcement order. Nevertheless, the public interest factor as one of the

considerations to be taken into account in determining whether an appeal would be rendered nugatory applies equally to the stay application herein.

[51] In its AIRs, Sinohydro did not make any affirmations to rebut KAJ's averments as outlined above. It is trite that where the deponent to an affidavit makes a positive assertion, which is not inherently incredible or inherently improbable, and his opponent in his affidavit does not credibly deny that allegation, a court should accept the former assertion as standing unrebutted (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; [1986] CLJ Rep 45; [1986] 1 CLJ 2 and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). The factual averments as to the revival of the project and efforts to draw in investors for the project are thus deemed to be admitted by Sinohydro.

[52] In her oral submission for Sinohydro, Ms SM Chan accentuated that KAJ merely averred that the project has been revived and no averment was made as to the progress of the construction works. The learned counsel argued that the site is a barren land which was reclaimed by Sinohydro without being paid and that the media statements did not expressly state that the MICT will be completed by May 2023.

[53] However, the court agrees with Mr Andrew Fernandez that for present purposes, the material fact is that the project has been reinstated and KAJ has pledged, among others, to complete the MICT within 15 months from March 2022. It is observed in passing that the revival of the project was not one of the grounds advanced by KAJ in its application to stay the AD pursuant to s 16(1)(a) of the CIPAA.

[54] Fast forward to the stay application, KAJ has shown sufficient evidence that, if the enforcement order is not stayed, there is a real risk that Sinohydro will proceed to take steps to sell the subject lands. This will have an adverse impact on the project and the investments which have been secured to date, including by foreign investors.

[55] In so far as Sinohydro's other arguments are concerned, the court holds the view that:

(a) there is no delay as the stay application was filed seven days after the ex parte order was made;

(b) whilst there are no general principles of law that a secured creditor must first realise its security before taking execution proceedings on assets without security in recovery of a judgment debt, nevertheless based on the facts in this case, KAJ has established its 'public interest' ground to support the stay application, which is a bona fide application; and

(c) KAJ's contention that, in obtaining the ex parte order, Sinohydro had failed to make full and frank disclosure of material facts, is a determination which must be made by the DR in relation to KAJ's application to set aside the ex parte order (encl 12 in AE No 31). This matter is addressed in Part (B) of this judgment on the appeal against DR's decision.

[56] Based on the foregoing reasons, this court is satisfied that KAJ has established that there are special circumstances to warrant an order as prayed. Even if this court has erred in coming to this conclusion, the court is empowered and has the discretion to grant a stay as KAJ has shown, on a balance of probabilities, that it will suffer irreversible and irreparable damage which cannot be compensated with costs in the event the subject lands are disposed and KAJ is later successful in the CIPAA appeals.

(B) THE APPEAL AGAINST DR'S DECISION

The grounds of appeal

[57] KAJ's grounds of appeal against the DR's decision are that the DR failed to appreciate:

(a) the effect of the decision of this court in respect of the stay application as adumbrated above, namely that the enforcement order is stayed. In other words, the AD itself was stayed from operating as if it is an order of the court under s 28 CIPAA. Therefore, the substratum of the ex parte order cannot be maintained or continue to be maintained;

(b) that there were material non-disclosures or suppression of material facts by Sinohydro warranting the setting aside of the ex parte order; and

(c) that the ex parte order was obtained by Sinohydro through abuse of process of the court. KAJ took the position that a secured creditor who is a chargee over identified lands cannot seize other unencumbered lands belonging to the judgment debtor to satisfy the judgment debt as if the secured creditor is an unsecured creditor. KAJ claimed that its right to deal with its unencumbered assets is prejudiced and it also prejudices the general body of unsecured creditors whom might have extended credit to KAJ.

The legal principles

[58] In so far as the legal principles for appeals to a judge in chambers from the decision of the DR, KAJ quoted the decision of the Federal Court in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241 for the proposition that appeals from decisions of the

registrars are by way of an actual re-hearing.

[59] For the court, reference is made to the following excerpt from the decision of this court in *Econpile*'s case:

> [18] The procedure governing these appeals, which are against the decisions of the DR to a judge in chambers, is provided in O 56 r 1 of the RoC 2012. It is trite that the principles for such appeals are similar to those governing an appeal from a trial on merits from the High Court to the Court of Appeal (see *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6).
>
> [19] It is further settled law that the 'plainly wrong' test is applicable in determining whether appellate intervention is warranted in appeals of this nature. In *Yaw Fun Fun (pemilik tunggal perniagaan yang dikenali sebagai Perniagaan Smart Power Land) v Ketua Polis Daerah Gombak & Ors* [2020] MLJU 2316; [2020] AMEJ 1795, this court had referred to cases of high authority, including the decisions of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; *Lee Chee Keong v Fadason Hodlings Sdn Bhd & Other Appeals* [2017] 7 CLJ 295, where useful guidance was given as to the application of this test.
>
> [20] Drawing upon the legal principles as elucidated in those cases, in this case, ASM has to convince this court that the DR was plainly wrong in arriving at her decision in the sense that she has so fundamentally misdirected herself; there being no or insufficient judicial appreciation of the affidavit evidence, or where the acceptance or rejection of the evidence is not founded on good reasons, and no reasonable Registrar could have reached that conclusion. It is only then that this court would be justified to intervene so as to prevent a miscarriage of justice.

The decision of the court

[60] It is undeniable that KAJ has a basic right to apply to set aside the ex parte order as it has not had the opportunity of being heard. KAJ's application is made pursuant to the following provisions in the RC 2012, apart from the inherent jurisdiction of the court:

> Order made ex parte may be set aside (O 32 r 6)
>
> 6 The Court may set aside an order made ex parte.
>
> ...
>
> Setting aside or varying judgment and orders (O 42 r 13)
>
> 13 Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[61] KAJ has made its application to the court within 30 days after the receipt of the ex parte order.

[62] In his written submission for KAJ, Dato' Loh Siew Cheang drew the attention of this Court to the following excerpt from the decision in *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260 at p 274:

> [32] *Sir John Donaldson MR writing a separate judgment for the Court of Appeal in the case of WEA Records Ltd v Visions Channel 4 Ltd and Others* [1983] 2 All ER 589... succinctly said ...:
>
> > Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in RSC Ord 32, r 6.
>
> Further down the same page, this was what His Lordship said:
>
> > As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

[63] With regards to the first ground of appeal, the court agrees with Sinohydro's submission that the effect of the order made by this court on 3 January 2023 is to stay the execution of the enforcement order. This means that the execution of the order made by this court on 16 April 2021 under s 28 of the CIPAA to enforce the AD is temporarily stayed until the hearing and disposal of KAJ's appeal against the decision of this court.

[64] It is very clear to this court that the decision on 3 January 2023 is not a stay of the AD. The substratum of the ex parte order made by the DR on 11 November 2022 is thus very much alive.

[65] However, the court is persuaded by KAJ's second ground of appeal, namely that the DR failed to appreciate that there were material non-disclosures by Sinohydro when it made the ex parte application for a WSS to be issued and a PO to be granted.

[66] In *The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals* [2022] 1 MLJ 316, Lee Heng Cheong JCA in delivering the judgment of the Court of Appeal cited the seminal English case of *Brink's-Mat Ltd v Elcombe and Others* [1988] 3 All ER 188 where Ralph Gibson LJ laid down the principles when considering

whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure. These principles are that:

(a) the duty of the applicant is to make a full and fair disclosure of all the material facts;

(b) the material facts are those which it is material for the judge to know in dealing with the application as made. Materiality is to be decided by the court and not by the assessment of the applicant or his solicitors;

(c) the applicant must make proper inquiries before making the application. The duty of disclosure applies to material facts known to the applicant and to any additional facts which he would have known if he had made such inquiries;

(d) the extent of the inquiries which is necessary depends on all the circumstances of the case including:

(i) the nature of the case which the applicant is making when he makes the application;

(ii) the order for which the application is made and the probable effect of the order on the defendant; and

(iii) the degree of legitimate urgency and the time available for the making of inquiries.

(e) if material non-disclosure is established, the court will be astute to ensure that a plaintiff who obtains an ex parte order without full disclosure is deprived of any advantage he may have derived by that breach of duty;

(f) whether the fact not disclosed is of sufficient materiality to justify an immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented; and

(g) in the event of material non-disclosure, the court may discharge the ex parte order even if it is established that the order would have been made, had there been full disclosure,

(see too, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; [2004] 1 CLJ 239).

[67] Upon obtainment of the enforcement order, Sinohydro is not barred from pursuing whatever remedies it has simultaneously or successively or even not all. Nevertheless, when it chose to seek the orders as prayed in the ex parte notice of application, it is incumbent on Sinohydro to make a full and fair disclosure of all the material facts which the DR should know in dealing with the application for the issuance of a WSS and a PO.

[68] Ms SM Chan argued for Sinohydro that matters which are material for disclosure in an application for a PO are prescribed in O 47 r 6(c) of the RC 2012, namely:

(a) the judgment or order to be enforced;

(b) the identity of the judgment debtor in respect of whose immovable property or interest an order is sought;

(c) the amount remaining unpaid under the judgment or order at the time of application;

(d) the immovable property or the interest therein in respect of which an order is sought; and

(e) the deponent's information or belief that the immovable property or interest in question is the judgment debtor's,

and hence, all the matters which KAJ contended are material and relevant in the ex parte application before the DR do not, in fact, need to be disclosed.

[69] However, in accordance with the legal principles as enumerated in para 66 above, materiality is to be decided by the court. Having closely examined the AIS (encl 2), it is immediately apparent that Sinohydro did not disclose the following material facts:

(a) Sinohydro is a secured creditor of KAJ whereby under the security agreement, charges were created in Sinohydro's favour over the Secured Lands as security for the payment of sums payable by KAJ in respect of the project of up to RM724,586,444. It was agreed that the total value of security to be provided by KAJ shall not be less than RM978,191,699.27;

(b) the titles of the Secured Lands are in Sinohydro's possession and Sinohydro has lodged private caveats over the same. The High Court has declared that Sinohydro is an equitable chargee over the nine plots of land;

(c) the subject lands are distinct from the nine plots of land as the former are not appropriated to Sinohydro as security and are available to unsecured creditors of KAJ involved in the project;

(d) Sinohydro and KAJ have a dispute that is before the Arbitral Tribunal involving Sinohydro's claim for RM348,268,544.59 and KAJ's counterclaim for RM739,200,221.69. The adjudication sum is part of the sum being claimed by Sinohydro in the arbitration;

(e) Sinohydro's petition to wind up KAJ premised on the adjudication sum was struck out by the court on the ground, inter alia, that the said sum is a disputed debt and Sinohydro did not appeal against the decision. In Sinohydro's AIR in the winding up proceedings, it claimed that the value of the nine plots of land is not enough to satisfy its *arbitral claim* of RM348,268,544.59. Based on this asserted fact, Sinohydro seized the subject lands which it claims has a value of RM240,672,276 according to the report by KPH Property Consultants Sdn Bhd ('KPH');

(f) the value of the subject lands in the report by the liquidator for purposes of the winding up proceedings ie RM915,382,382, is different from the value according to KPH's valuation certificate as exhibited in Sinohydro's AIS in respect of the application for the ex parte order; and

(g) the project is an ongoing national project and is part of the Economic Transformation Programme of the nation. In March 2022, KAJ, the State Government of Melaka and the Malaysian Investment Development Authority had promoted the project at the Dubai Expo 2020 to attract foreign direct investments. This is material to the issue of the probable effects of the ex parte order on KAJ and the project.

[70] This is certainly not a case of innocent non-disclosure. To the contrary, the court agrees with KAJ's submission that there is material non-disclosure by Sinohydro when making the ex parte application and the DR had failed to appreciate this salient aspect of the case when deciding KAJ's application to set aside the ex parte order.

[71] There is no doubt in my mind that Sinohydro is in breach of the duty to make a full and fair disclosure of all the material facts to enable the DR to make a fair and just assessment of Sinohydro's application for the issuance of the WSS and a PO. As a result, the immediate discharge of the ex parte order is justified. The court therefore allowed the appeal against DR's decision primarily on this ground.

PRONOUNCEMENT

[72] Based on the aforesaid reasons, the court allowed both KAJ's stay application and the appeal against DR's decision as earlier stated in para 2 of this judgment.

Stay of execution of order to enforce the AD allowed; and ex parte order for issuance of the WSS and PO set aside.

Reported by Ashok Kumar